No. 80-120

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, and NORTHWESTERN LUTHERAN ACADEMY
Petitioners

v.

THE STATE OF SOUTH DAKOTA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF GERMANTOWN FRIENDS SCHOOL AND FRANKFORD FRIENDS SCHOOL AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

1. Germantown Friends School and Frankford Friends School, Quaker primary and secondary schools located in Philadelphia, Pennsylvania, hereby apply for leave to submit the attached brief as amici curiae.

2. Pursuant to Rule 36.2 of the Rules of this Court, consent to the filing of this brief was requested from both parties to this case. Petitioners have granted written consent to the filing of this amicus brief; however, respondent State of South Dakota has not granted its consent.

3. In determining whether or not religious schools may, consistent with the statute and the Constitution, be made subject to the unemployment

compensation laws, this Court's decision will have a direct impact upon the amici. The amici, for the past three years, have been litigating the issues raised in the instant case before the Pennsylvania Bureau of Employment Security, the Eastern District of Pennsylvania, the Third Circuit Court of Appeals, and the Commonwealth Court of Pennsylvania. Amici believe that being made subject to the Federal Unemployment Tax Act ("FUTA") will seriously impede their religious mission, and subject them to governmental scrutiny and entanglement, all in contravention of the Constitution and the express intent of their elected officials.

4. Amici, to their knowledge, are the sole representatives in this proceeding of the Religious Society

of Friends, known as the Quakers. These Quaker schools are among the oldest religious primary and secondary schools in America. Amici believe that their distinctive approach to education, relation to their religious community, and religious heritage merit the Court's attention as it considers whether and which religious schools should be held exempt from FUTA.

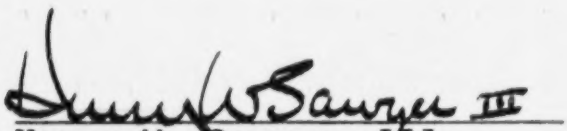
5. Amici's brief raises a constitutional argument which, to their knowledge, has not been presented in the other briefs in this proceeding, namely, that the First Amendment forbids distinguishing among demonstrably religious schools on the basis of their organizational structure or practice.

CONCLUSION

For the foregoing reasons, the amici respectfully request this

Court to grant their motion to file the attached brief as amici curiae.

Respectfully submitted,



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INTEREST OF THE AMICI CURIAE

Germantown Friends School and Frankford Friends School were established in 1845 and 1760, respectively, for the purpose of providing children with an education immersed in the Quaker faith and lifestyle. A century and half later, there has been no diminution in the schools' primary and essential commitment: "to develop [the] spirit, mind and body of each student so that all may become more effective instruments for carrying out the Divine will, that is the will of God."[1] Each is overseen by a School Committee appointed

1. Germantown Friends School v. Pennsylvania Department of Labor and Industry, No. 940 C.D. 1979 (Pa. Cmwlth. Ct. 1979), Reproduced Record at 84a, [hereinafter cited as Germantown Record].

by its respective Monthly Meeting of Friends. As religious schools, they are prohibited under the Establishment Clause decisions of this Court from receiving most forms of state assistance.

The amici, since 1977, have been engaged in both federal and state court litigation with respect to the issues presently before this Court. The District Court for the Eastern District of Pennsylvania held, on the basis of the Tax Injunction Act of 1937, that it lacked jurisdiction to decide the merits of the case,[2] which decision was affirmed by the

2. Germantown Friends School v. Joseph, No. 79-1539 (E.D. Pa. Sept. 6, 1979); Frankford Friends School v. Joseph, No. 79-1540 (E.D. Pa. Sept 6, 1979).

Third Circuit Court of Appeals.[3] The Commonwealth Court of Pennsylvania[4] has heard oral argument on the merits of the case, but has not yet rendered an opinion.

The case now before this Court concerns the interpretation and constitutionality of the Federal Unemployment Tax Act ("FUTA"), as applied by the Department of Labor and the State of South Dakota to religious schools. The amici have at least two

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3. Frankford Friends School v. Joseph, No. 79-2513 (3rd Cir. July 1, 1980) (affirmed without opinion); Germantown Friends School v. Joseph, No. 79-2512 (3rd Cir. July 1, 1980) (affirmed without opinion). Both dispositions are noted at 624 F.2d 1090 (1980).

4. Germantown Friends School v. Pennsylvania Department of Labor and Industry, No. 940 C.D. 1979 (Pa. Cmwlth. Ct., 1979); Frankford Friends School v. Pennsylvania Department of Labor and Industry, No. 939 C.D. 1979 (Pa. Cmwlth. Ct., 1979).

reasons for submitting this brief to the Court. First, to their knowledge they are the sole representatives in this proceeding of a distinctive and historic religious faith and heritage, that of the Quakers. Secondly, the manner in which these schools are operated and the nature of their relationships with their sponsoring religious organizations may be somewhat different than that of the petitioners in this case. Should this Court find petitioners to be exempted from FUTA's coverage, the amici urge that the Court's opinion be phrased broadly enough to include within its scope the amici.

QUESTIONS PRESENTED

1. Whether, consistent with FUTA and the Religion Clauses, the government may exempt some religious schools from FUTA while including others, solely on the basis of distinctions in their polity and practice.

2. Whether religious schools come within the exemptions of FUTA for services performed for a "church" or an organization "operated primarily for religious purposes."

3. Whether subjecting religious schools to FUTA violates the Religion Clauses of the First Amendment.

SUMMARY OF ARGUMENT

It was never the intent of Congress, and it is not consistent with the First Amendment, to subject religious schools to the unemployment compensation laws. The plain language of the statute provides religious schools with two applicable exemptions: employment in such schools constitutes employment both for a "church" and for an organization "operated primarily for religious purposes." Subjecting religious schools to FUTA, in the absence of any clear, affirmative congressional intent to do so, and in the face of potential infringements of the schools' First Amendment rights, would run directly counter to this Court's decision in Catholic Bishop

of Chicago. Moreover, the application of the law to religious schools impermissibly infringes their free exercise rights and excessively entangles church and state.

Finally, the decision of the Secretary of Labor giving rise to this case has been given nationwide effect. Religious schools of various faiths, denominations and sects and with differing organizational structures have been affected, in contravention of both the statute and the Constitution. The identical issue is being litigated in various state and federal courts. Should this Court find in favor of petitioners, it would avoid further protracted litigation across the Country if the Court's opinion is

made clearly applicable to all religious schools.

ARGUMENT

I. IN ITS DECISIONS CONSTRUING THE RELIGION CLAUSES, THIS COURT HAS NEVER DISTINGUISHED AMONG DIFFERENT TYPES OF RELIGIOUS SCHOOLS

A. Recent Trends to Arbitrarily Distinguish Among Types of Religious Schools

One of the most disturbing elements of the application of FUTA to religious schools, and the recent litigation surrounding these issues, is the artificial distinctions that have been drawn between various types of religious schools. For purposes of determining whether religious schools are exempted from FUTA, "church schools" have been distinguished from "church related" and "parent operated" schools;

and numerous other secondary factors related to religious polity and practice have been cited by agencies and courts as being significant.[5] The amici assert that under the Religion Clauses as interpreted by this Court such distinctions are impermissible and provide no workable guidelines for the exercise of administrative discretion.

B. The Nature of the Amici.

Amici are Quaker schools. Frankford Friends School has been in operation since the Colonial era; Germantown Friends School since the early nineteenth century.

A Friends school is a place where "God is above all else," and

5. See e.g., Alabama v. Marshall, 626 F.2d 366, 368 (1980) (separate legal existence, employees hired by church officials, ownership by church of school buildings, employees paid from church accounts).

"the centrality of God pervades the daily living."[6] There are weekly meetings of worship in the schools which are conducted in the Quaker manner of silent worship. The testimony of the Friends schools is not in proselytizing, but in evidencing in all activities Friends' beliefs in peace, simplicity, brotherhood, and the light of God in every person.

Each of these Friends schools is overseen by a Monthly Meeting of Friends, which is equivalent to a local church. Each Monthly Meeting is autonomous and owns its own property. The land and facilities used by the schools are owned by the Monthly Meetings and are made available to the schools rent-

6. Germantown Record, supra note 1, at 114a.

free. In addition, the Monthly Meetings make annual contributions to the schools to be used for scholarships and for the library.

The bulk of the resources of the schools is derived from tuition payments. Other sources of income include endowments and donations from members of the Meetings and parents and friends of the schools. The schools derive virtually no aid from the state since they have been deemed to come within the Establishment Clause decisions of this Court. (As a specific consequence of this Court's decision in Lemon v. Kurtzman,[7] reimbursement provided by the Commonwealth of Pennsylvania to these schools was terminated.) For administrative convenience, the

7. 403 U.S. 602 (1971).

schools' payrolls are separate from those of the Monthly Meetings.

The activities and policies of the schools are determined and overseen by the School Committees of their respective Monthly Meetings. The School Committees are selected by the Monthly Meetings and are composed primarily, in the case of Germantown Friends School, and exclusively, in the case of Frankford Friends School, of members of the Monthly Meetings. The School Committees each appoint a headmaster who is responsible for the day-to-day operations of the schools. The School Committees regularly report the activities and affairs of the schools to the Monthly Meetings, which retain ultimate authority over the schools.

About one-third of the faculty and approximately 8% and 3-1/2%, respectively, of the students at Germantown Friends School and Frankford Friends School are Quakers. As long as they are sympathetic to the teachings of the Quakers, parents of any faith may send their children to the schools.

C. In Applying the First Amendment to Religious Schools, This Court Has Never Drawn Distinctions Based on Organization or Practice

With respect to the manner in which religious schools are organized and run, there tend to be both commonalities among schools of the same sect and notable distinctions between the schools of differing faiths. Hence, making such distinctions between religious schools may have the effect of

discriminating between religious faiths based on the form of their worship.

This Court has repeatedly indicated that such distinctions are constitutionally forbidden. In NLRB v. Catholic Bishop of Chicago it stated:

> We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where 'completely religious' takes over or, on the other hand, ceases. In our opinion the dichotomous 'completely religious - merely religiously associated' standard provides no workable guide to the exercise of discretion.

440 U.S. 490, 495 (1979) quoting 559 F.2d 1112, 1118 (1977).

In Sherbert v. Verner 374 U.S. 398 (1963), the Court emphasized the "governmental obligation of neutral-

ity in the face of religious differences." Id. at 409. Moreover, in Braunfeld v. Brown, 366 U.S. 599 (1961) the Court declared

> [i]f the purpose or effect of a law is to... discriminate invidiously between religions, that law is constitutionally invalid.... Id. at 607.

Other decisions of this Court regarding religious schools lead inescapably to the conclusion that, where government proposes either to grant a benefit or impose a burden, the only distinction permissible under the First Amendment is whether a school is demonstrably and genuinely religious in nature. Further distinguishing between religious schools on the basis of differences in structure or practice would itself constitute a violation

of their religious liberties and this Court's mandate that "no religion be . . .favored . . . and none inhibited."[8]

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8. Walz v. Tax Commission, 397 U.S. 664, 669 (1970). Such liability-determinative classifications would constitute governmental discrimination based on the form of worship. This Court has stated in Cantwell v. Connecticut, 310 U.S. 293 (1940), that "freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law . . . The Religion Clauses safeguar[d] the free exercise of the chosen form of worship." Id. at 303-04 (emphasis added). In Abington School Dist. v. Schempp, 374 U.S. 203 (1962), the Court reiterated this theme by stating that "the Free Exercise Clause . . . recognizes the value of religious training, teaching, and observance, and, more particularly, the right of every person to freely choose his own course with reference thereto, free from any compulsion from the state." Id. at 222 (emphasis added).

II. NEITHER THE EXPRESS PROVISIONS OF THE STATUTE NOR THE ASCERTAINABLE INTENT OF CONGRESS SUPPORTS THE IMPOSITION OF FUTA ON RELIGIOUS SCHOOLS

A. The Lack of Congressional Intent

American churches and religious schools have historically been treated with a "benevolent neutrality"[9] by the Congress and the legislatures of the various States. In general, taxation of religious entities has been scrupulously avoided. There is not a whit of evidence in the relevant legislative materials that Congress ever contemplated that, by the mere deletion of a single clause, it would suddenly sweep thousands of religious schools, and tens of thousands of religious school teachers in all fifty

9. Walz v. Tax Commission. 397 U.S. 664, 676 (1970).

states, within the ambit of FUTA's taxation and regulation. There is not a single reference to "religious" or "church related schools," no study of the constitutionality or impact of such a breach with the past, no testimony received from religious leaders, and no statements made by any members of Congress concerning the impact on religious schools.[10] If Congress intended to produce the result argued by respondents, it was achieved with an astonishing and unprecedented degree of silence.

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10. See Alabama v. Marshall, 626 F.2d 366, 368 (1980); Recommended Decision, J.A. at A-31 & 32. For a discussion of the legislative history of the 1976 FUTA amendments and an analysis of the issues presented in this case, see generally, Comment, Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues, 25 VILL. L. REV. 60 (1979-80).

It was against this backdrop of legislative silence that the Secretary of Labor deduced, ex nihilo, a Congressional mandate to impose the unemployment tax and its concomitant regulation upon the schools. The Secretary's decision to bring the schools within FUTA's scope came only "after over a year of equivocation," Alabama v. Marshall, 626 F.2d 366, 368 (1980), and amounted to a complete reversal of the Department's earlier position issued just after the 1976 amendments. Recommended Decision, J.A. at A-28 & 29.

This Court's recent decision in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), affords a very close precedent to the instant case. The basic principle of Catholic Bishop

of Chicago would appear to be that application of a statute to church-related entities will not be upheld where it implicates sensitive issues of religious faith and practice, or creates the potential for infringement of important First Amendment rights, if it is not manifest that the legislature acted clearly, expressly, and affirmatively. The essential policy consideration involved is that only elected officials should make decisions where religious freedom is concerned, so that there may be public input, open debate, and thorough review. Such action should not emanate from the closed meetings of administrative agencies, as was the case in the Secretary's decision.

B. The "Plain Meaning" of the Statute

Reinforcing the conclusion that Congress never intended to eliminate the exemption of religious schools from FUTA is the fact that the 1976 amendments retained intact the section 3309(b)(1)(A) and (B) exemptions for employment in churches and organizations operated primarily for religious purposes. The statute involved in Catholic Bishop contained no similar exemptions. The amici assert that they come within the "plain language" of both of these provisions.

1. The Section 3309(b)(1)(A) "Church" Exemption

The amici contend that services performed by their employees are

services performed in the employ of a "church" for the purposes of section 3309(b)(1)(A). Clearly the Monthly Meetings of Friends which oversee these schools are "churches" for all legal purposes. The Schools themselves are offspring of the parent Monthly Meetings, created and operated to further the religious mission of the Society of Friends. The education of youth in religious schools has always been a deeply held commitment of the Quakers, who, in obedience to perceived Scriptural mandates, founded these educational institutions. Today they represent some of the oldest religious elementary and secondary schools in the Nation. They are uniquely suited to the achievement of vital objectives of the Monthly

Meetings: to promote future generations of faithful worshippers and to reach out to their communities with the teachings and values of Quakerism.

As counsel for the Department noted in her memorandum to the Secretary of Labor:

> this position [bringing religious schools within FUTA's scope] ... does [pose] numerous interpretative problems relating to... legal organization and interrelationship of "churches" and "schools" (e.g., episcopal, congregational, representative government structures) by placing a premium on legal employment and ignoring the educational activity as the basis for the former exemption. Thus, a religious body organized along episcopal lines obtains a highly centralized authority over the affairs of local bodies and their activities, tending to merge the "church" and the "school" under a single umbrella.... [A] nice question is presented as to whether

> any exemption should be determined merely by the form of business association a particular organization elects rather than on the basis of the activity performed, i.e., the operation of an elementary or secondary school.

Memorandum for the Secretary, J.A. at A-49.

2. The Section 3309(b)(1)(B) Exemption for Organizations "Operated Primarily for Religious Purposes"

The amici believe that they also clearly come within the FUTA's exemption for "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church...."

The test for meeting Section 3309(b)(1)(B) is two-pronged. An organi-

zation, to qualify, must first demonstrate that it is operated primarily for religious purposes. Amici believe that they come within this Court's description of the religious schools involved in Catholic Bishop:

> If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an 'integral part of the religious mission of the Catholic Church,'... courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry and English literature."

440 U.S. at 496 quoting 559 F.2d 1112, 1118 (1977).

The second prong of the test is that the schools be "operated, super-

vised, controlled, or principally supported by a church..." (Emphasis added.) There is no question but that this test is met by the amici. Their respective Monthly Meetings of Friends "operate" and maintain ultimate "control" over the schools; thus, any decision to terminate the schools or to move their physical location would have to be taken by the Monthly Meetings. The Monthly Meetings also "supervise" the schools through the frequent meetings of their School Committees, which provide continuous oversight.

Quakers adhere to a unique process of collective decisionmaking, in which proposed decisions are discussed until all members are united

in the Divine Will. This process has become popularly known as "the sense of the Meeting." To Quakers, the evidence of "supervision" and "control" is less in an hierarchical structure than in a course of conduct prayerfully arrived at, demonstrating conformity with the will of God as revealed to the Meeting.

III. SUBJECTING RELIGIOUS SCHOOLS TO THE PROVISIONS OF FUTA VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT BY BURDENING THE SCHOOLS' RELIGIOUS MISSION AND BY EXCESSIVELY ENTANGLING CHURCH AND STATE.

The burdens which FUTA impose on amici are more than potentialities; the schools have already directly experienced the oppressive taxation and regulation inherent in the statute. Moreover,

the application of FUTA to religious schools will have the effect of excessively entangling church and state.

Although this is a Free Exercise case, and the decisions of this Court discussing the factor of "excessive entanglement" of church and state have primarily arisen under the Establishment Clause, Catholic Bishop of Chicago recognized that this concept goes to the heart of both Religion Clauses and is applicable here. 440 U.S. at 499.

A. The Tax

The most obvious and direct of FUTA's burdens on the religious schools is the tax itself, which is often very substantial. For instance, Germantown Friends School was assessed

contributions in the approximate amount of $16,800 for a single year.[11]

This Court has never held that the taxation of religious organizations is per se unconstitutional. However, this Court's decision in Walz v. Tax Commission, 397 U.S. 664 (1970) implies that a tax which excessively burdens religious schools in the absence of a compelling state interest is impermissible.

The imposition of the tax, with its associated oversight, enforcement, and collection provisions, also entails potential entanglement. As this Court stated in Walz, with respect to state real estate taxation:

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11. Germantown Friends School v. Pennsylvania Department of Labor and Industry, No. 940 C.D. 1979 (Pa. Cmwlth. Ct. 1979), Brief for Petitioner at 35 & 36.

> "Elimination of [tax] exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontation and conflicts that follow in the train of these legal processes."

397 U.S. at 674.

B. Reporting and Recordkeeping Requirements

Like most tax statutes, the unemployment tax laws monitor the compliance of subject institutions by requiring detailed reports and records. As applied to religious schools, FUTA's recordkeeping and reporting requirements are fraught with unconstitutional burdens and entanglements.

In Pennsylvania, for instance, each employer is required to keep "clear, accurate and complete employment and

payroll records" regarding each employee.[12] There is also a four year retention requirement for certain business records, such as cash journals, ledgers, and corporate minutes, in order to provide the Bureau of Employment Security with extensive and exceedingly detailed employment information. The schools will be required, at additional cost and time, to train personnel to compile and present the data.

Moreover, because FUTA requires coverage only of employees who spend more than half of their time engaged in non-exempt services,[13] the schools will be required to determine, and

12. 43 P.S. §766. See also 34 Pa. Code §63.51 et seq.

13. I.R.C. §3306(d). See Directive: Unemployment Insurance Program Letter No. 39-78 J.A. at A-43.

the government will be required to investigate, what percentage of an employee's time is spent serving the church directly, and what percentage is spent serving the school.

In addition to these burdens, the reporting and recordkeeping requirements of FUTA have an even greater potential for creating excessive entanglement. In general, the application of FUTA to religious schools requires the state unemployment agencies to draw innumerable subtle distinctions between "secular" and "sacred".

For example, throughout the administrative hearing in which amici's initial tax assessment was challenged, the hearing examiner called on the representatives of the schools to

specify those activities of the schools which are purely religious. He challenged them to explain how religion enters into the teaching of spelling or mathematics and to explain how the schools determine whether a prospective teacher is sympathetic to Quaker ideals and beliefs.[14]

The unemployment laws also require that religious schools be subject to state audit of their extensive employment records. See, e.g., 43 P.S. §§761 & 875.[15] This policing

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14. Germantown Record, supra note 5, at 93a, 102a, 104a-105a, 114a, 117a, 119a, 121a.

15. Section 875 is designated "Periodic Spot Checks and Investigation." It is interesting that in Lawrence E. Weatherford's Memorandum, J.A. at A-36, there is a discussion of how administrators are to "test" the extent of "strictly religious" services in a

(continued)

of the regulations raises the spectre of bureaucrats in religious school classrooms, verifying among other things, that teachers reported as exempt are devoting more than half their time to "primarily religious" pursuits. Such activity would clearly constitute "excessive entanglement" of a nature found to be impermissible by this Court in Lemon v. Kurtzman:

> In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate

15. (continued)

religious school. The Memorandum concludes:

> The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the oganization and the church.

J.A. at A-39.

> and continuing relationship between church and state.

403 U.S. 602, 619-20 (1971).

If allowed to continue unchecked, this governmental process of attempting to separate activities of a community of worshippers into discrete secular and religious components on the basis of governmental standards may undermine the freedom and independence of religion in America. Since its inception, this Court has carefully protected the rights of religious organizations to independently determine matters of faith and polity.[16] Implicitly recognized in these cases is the right of churches to determine

16. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952); Cantwell v. Connecticut, 310 U.S. 296 (1940).

within reason which of their activities are, and which are not, "religious."

C. Good Cause Litigation

A third serious impact of the unemployment compensation laws on religious schools is their potential to draw schools into costly and burdensome litigation over the issue of whether employment was terminated for "good cause." For a religious school electing the reimbursement method of payment, "good cause determinations" could seriously affect the school's financial status because if the school prevails, it pays nothing; but if it loses, full reimbursement is required. In this regard, "good cause" determinations could chill a decision to dismiss a teacher for engaging in or advocating

secularly acceptable but religiously prohibited conduct. The government would be empowered to decide whether a religious school's action, taken on the basis of religious standards, constitutes "good" cause under the prevailing standards of the State Labor Bureau.

The District Court in Grace Brethren noted that "good cause" litigation also carries the potential for serious entanglement:

> disputes unquestionably will arise in situations where employees are dismissed for cause and the reason given by the church school is a failure to adhere to religious tenets of the church.
>
> The type of inquiry necessary to the resolution of controversies such as these is almost identical to that which the Court found to involve dangers of excessive entanglement in Catholic Bishop.... Such an inquiry taken by itself, involves impermissible entan-

> glement of the state with the church, violative of the separation of those entities mandated by the Constitution.

Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 12 (C.D. Cal. Sept. 21, 1979).

CONCLUSION

It would be fundamentally unfair to hold that these religious schools, which under Lemon v. Kurtzman have been held to be too religious to receive public assistance, are insufficiently religious to come within the exceptions for religious organizations which are contained in FUTA. As the Seventh Circuit stated in its opinion in Catholic Bishop of Chicago v. N.L.R.B., the government is

> cruelly whip-sawing their schools by holding that institutions too religious to

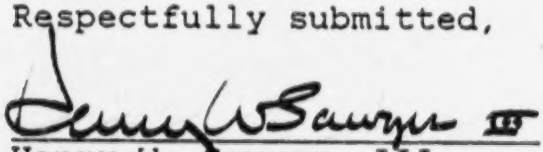
> receive government assistance are not religious enough to be excluded from its regulations.

559 F.2d 1112, 1119 (1977).

The courts in every jurisdiction which have reached the merits of this issue (except for the court below) have decided in favor of the religious schools. The Constitution, the decisions of this Court and the plain language and legislative history of the statute stand as three eloquent witnesses of the wisdom of those decisions.

Accordingly, the judgment of the Supreme Court of South Dakota should be reversed.

Respectfully submitted,



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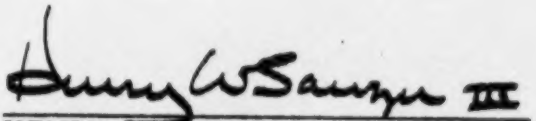
CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion for Leave to File Brief and Brief of Germantown Friends School and Frankford Friends School as *Amici Curiae* were served this 18th day of December 1980, by mail, postage prepaid, on Edward Thomas Schilling, Esq. 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for petitioners in No. 80-120; and Judith A. Atkinson, Esq., Assistant Attorney General, Office of the Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent in No. 80-120.



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